

ORIGINAL

DOCKET FILE COPY ORIGINAL
DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

OCT 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Applications of)
AT&T Corporation,)
Transferee,)
and)
Tele-Communications, Inc. (TCI),)
Transferor,)
)
For FCC Consent to Transfer of)
Control Pursuant to Section 310(d))
of the Communications Act, as amended,)
of Licenses and Authorizations Controlled)
by TCI or its Affiliates or Subsidiaries)

CC Docket No. 98-178

COMMENTS OF AMERITECH

Kelly R. Welsh
John T. Lenahan
Counsel for Ameritech
30 S. Wacker Drive
39th Floor
Chicago, Illinois 60606
(312) 750-5367

Christopher M. Heimann
Counsel for Ameritech
1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
(202) 326-3818

No. of Copies rec'd
List ABCDE

JH2

Table of Contents

I.	INTRODUCTION AND SUMMARY	2
II.	THE VERTICAL INTEGRATION RESULTING FROM THE PROPOSED AT&T/TCI MERGER CREATES COMPETITIVE ADVANTAGES THAT NO OTHER TELECOMMUNICATIONS ENTITY WILL ENJOY.	5
III.	THE COMMISSION SHOULD IMPOSE CERTAIN CONDITIONS ON THE GRANT OF THE MERGER TO ENSURE OPEN ACCESS TO BROADBAND FACILITIES AND SERVICES ANALOGOUS TO REQUIREMENTS IMPOSED ON INCUMBENT LECs.	13
A.	<i>Interconnection and Unbundling</i> -- Interconnection and Unbundling Obligations Imposed on Incumbent LECs Pursuant to Section 706 of the 1996 Act Also Should Apply to the Combined AT&T/TCI.	17
B.	<i>Collocation for Cable Modem Service</i> -- AT&T Should Be Required To Allow Competitors to Collocate Equipment at AT&T/TCI Headends.	20
C.	<i>Access to Multiple ISPs</i> -- AT&T Should Be Required to Provide Access to "Last Mile" Infrastructure to Unaffiliated ISPs on a Nondiscriminatory Basis.	21
D.	<i>Resale</i> -- AT&T Should Be Required to Offer for Resale at Wholesale Rates Any Advanced Services Offered to Subscribers That Are Not Telecommunications Carriers.	23
E.	<i>Access to Poles, Ducts, Conduits, and Rights-of-Way</i> -- The Commission Should Require AT&T To Provide Access to the Poles, Ducts, Conduits, and Rights-of-Way Controlled by TCI in Accordance with Section 224.	24

IV.	THE COMMISSION SHOULD IMPOSE PROGRAM ACCESS CONDI- TIONS TO ENSURE THAT THE AT&T/TCI MERGER DOES NOT RESTRICT ACCESS TO VIDEO PROGRAMMING BY ALTERNATIVE PROVIDERS OF MULTICHANNEL VIDEO PROGRAMMING.	25
A.	The AT&T/TCI Merger Threatens to Deny Alternative MVPDs Access to Programming They Need to Compete in MVPD Markets.	28
B.	The Commission Should Condition Approval of the Proposed AT&T/TCI Merger on AT&T's Commitment to Comply with Certain Program Access Conditions.	36
V.	CONCLUSION	39

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of)	
AT&T Corporation,)	
Transferee,)	
and)	CC Docket No. 98-178
Tele-Communications, Inc. (TCI),)	
Transferor,)	
)	
For FCC Consent to Transfer of)	
Control Pursuant to Section 310(d))	
of the Communications Act, as amended,)	
of Licenses and Authorizations Controlled)	
by TCI or its Affiliates or Subsidiaries)	

To: The Commission and the Cable Services Bureau

Comments of Ameritech

Ameritech respectfully submits these comments in response to the Cable Services Bureau's Public Notice seeking comment on the joint applications filed by AT&T Corporation ("AT&T") and Tele-Communications, Inc. ("TCI") for Commission approval of the transfer of control to AT&T of licenses and authorizations controlled by TCI or its affiliates or subsidiaries.¹

¹ See Public Notice, "Cable Services Bureau Action; AT&T Corporation and (continued...)"

I. INTRODUCTION AND SUMMARY

Ameritech does not oppose the proposed AT&T/TCI merger so long as such combination is not permitted to erect anti-competitive barriers to others, including Ameritech, who seek to compete with AT&T's proposed offering of a "fully integrated package of communications, electronic commerce and video entertainment services" ² Therefore, to ensure regulatory parity, and competitive and technological neutrality, the Commission should impose the conditions described below on its approval of the proposed AT&T/TCI merger to guarantee that any public interest benefits resulting from the merger are realized.

Through its recent acquisitions and joint ventures (*i.e.*, McCaw Cellular, Teleport, British Telecom, TCI, and Vanguard Cellular), AT&T has positioned itself as a vertically integrated, facilities-based provider of an integrated package of high-speed, broadband voice, video, data, and Internet-related services. In this current era of digital convergence, the Commission should promote a level regulatory playing field and dismantle regulatory distinctions based on technology

¹ (...continued)
Tele-Communications, Inc. Seek FCC Consent for a Proposed Transfer of Control," CS Docket No. 98-178, DA 98-1969 (rel. Sept. 29, 1998).

² Opening Remarks of Michael Armstrong, Chairman & CEO, AT&T, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998.

and industry segments. Accordingly, the Commission should condition its approval of the proposed AT&T/TCI merger on requirements designed to ensure a level playing field in two fundamental areas: (1) open access to AT&T's broadband facilities and (2) access to video programming controlled by AT&T/TCI, at least until two active cable competitors are providing advanced services on an integrated basis.

First, due to the combined AT&T/TCI's control of "last mile" facilities and its proposal to offer an integrated package of telephony, video, and advanced broadband services,³ the Commission should impose interconnection, unbundling, collocation, and resale requirements designed to ensure open access to AT&T's broadband network. Specifically, the Commission should require AT&T: (1) to provide unbundled access to its fiber optic distribution network and to its hybrid-fiber-coaxial (or HFC) facilities; (2) to allow collocation of cable-modem termination equipment and fiber optic transmission interface equipment at AT&T/TCI headends; (3) to provide access to "last mile" infrastructure to unaffiliated ISPs on a nondiscriminatory basis; (4) to offer for resale at wholesale rates

³ These requirements, of course, should sunset when regulatory requirements on incumbent LECs "last mile" facilities are eliminated. This is a basic regulatory principle to ensure a level playing field as industries converge and as the pro-competitive, deregulatory model envisioned by Congress is realized.

advanced services and other programming services offered on an integrated basis using AT&T/TCI cable network facilities; and (5) to provide access to ducts, conduits, and rights-of-way controlled by AT&T/TCI in accordance with Section 224 of the Communications Act of 1934, as amended (the "Communications Act"). These conditions advocated by Ameritech formalize and solidify the unbundling and open access commitments verbally made to this Commission by both AT&T and TCI.

Second, due to AT&T/TCI's control of Liberty Media Group, TCI's video programming subsidiary, the Commission should require AT&T/TCI and Liberty to provide alternative multichannel video programming distributors ("MVPDs") with access to video programming. Specifically, the Commission should require AT&T to commit: (1) that Liberty will be subject to the full panoply of program access requirements; (2) that Liberty, or any other programming subsidiary of AT&T or TCI, will provide MVPD new entrants access to all programming on the same rates, terms and conditions as those offered to TCI or any of its cable affiliates in such new entrant's markets, regardless of whether such programming is delivered terrestrially; (3) that AT&T/TCI will waive any existing exclusive program access agreements between TCI and other cable programming networks, and that it will not conclude any new exclusive programming agreement for at least five years; and (4) to submit any proposed restructuring of Liberty to the Commission for public

comment and approval to ensure that any such restructuring is not merely a sham to evade the program access rules. By imposing these conditions, the Commission will minimize, to the extent possible, the possibility that AT&T/TCI and Liberty will use the proposed transaction to circumvent the program access rules, and thus limit competition in the multichannel video programming distribution market.

II. THE VERTICAL INTEGRATION RESULTING FROM THE PROPOSED AT&T/TCI MERGER CREATES COMPETITIVE ADVANTAGES THAT NO OTHER TELECOMMUNICATIONS ENTITY WILL ENJOY.

Through its recent and proposed acquisitions, AT&T is acquiring all of the functionalities necessary to serve in totality the communications needs of its customers. AT&T is the largest provider of domestic and international long distance service in the United States, and AT&T has recently acquired the largest CLEC – Teleport.⁴ AT&T recently acquired what was then the leading provider of cellular telephone service in the United States – McCaw Cellular.⁵ And, now AT&T is purchasing Vanguard Cellular Systems to fill in gaps in AT&T's facilities-based

⁴ See *Teleport Communications Group, Inc. and AT&T Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 15236, paras. 3, 5 (rel. July 23, 1998).

⁵ See *Applications of Craig O. McCaw and American Telephone and Telegraph Company*, 9 FCC Rcd 5836, 5840 (1994), *aff'd sub nom.*, *SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (1995).

wireless service in the northeastern portion of the United States, adding to its already leading wireless infrastructure.⁶

AT&T's mergers and acquisitions have not been limited to the domestic telecommunications marketplace. On July 26, 1998, AT&T and British Telecom announced the merger of their international operations into a jointly owned corporation. This joint venture unites the largest carriers in United States and Great Britain. The combined entity will be the dominant carrier of trans-Atlantic traffic and the largest carrier of cross-border traffic in Europe. During the first year of operation, the AT&T/British Telecom joint venture is estimated to generate approximately \$10-11 billion in revenue by serving over 237 countries. In 1998, the combined international traffic of AT&T and British Telecom is expected to reach 25 billion minutes.⁷

Now AT&T proposes to acquire TCI – which together with its affiliates is the largest cable system operator in the United States.⁸ Following the merger, the AT&T wholly owned and affiliated cable systems will pass 33 million

⁶ See, e.g., Rebecca Blumenstein, *AT&T's Internet-Technology Plans Call for Spending 'Billions and Billions,'* Wall St. J., Oct. 9, 1998, at B6.

⁷ See generally *AT&T and BT to Form \$10 Billion Global Venture To Serve Customers Around the World*, PR Newswire, July 26, 1998.

⁸ See Paul Kagan Assoc., *Top Cable System Operators as of May 1998*, Cable TV Investor, Sept. 11, 1998, at 7.

homes.⁹ And, according to press reports, AT&T's Chairman Michael Armstrong is seeking more cable partners to broaden the reach of its pending merger with TCI to reach 60 percent of United States homes.¹⁰ AT&T has stated that following the merger it plans to integrate its consumer long distance, wireless, and Internet services with TCI's cable, telecommunications, and high speed Internet businesses in a new subsidiary, AT&T Consumer Services.¹¹ AT&T proclaims that this integrated subsidiary "will own and operate the nation's most extensive broadband local network platform" and "will bring to people's homes the first truly *integrated* package of communications, electronic commerce and video entertainment services."¹² This integrated package of services will be offered under the AT&T brand name, which enjoys a high level of consumer recognition nationally.¹³ In

⁹ TCI's systems directly pass 20.9 million homes and its affiliated systems pass 13.2 million additional homes. *See generally* AT&T/TCI Merger Application, Description of Transaction, Public Interest Showing, and Related Demonstrations at 6-7 ("AT&T/TCI Application"); Tele-Communications, Inc., Form 8-K, at Exhibit 99.1 (July 1, 1998) (attaching AT&T News Release, AT&T and TCI To Merge, June 24, 1998) ("AT&T Merger News Release").

¹⁰ *See* Rebecca Blumenstein, *AT&T's Internet-Technology Plans Call for Spending 'Billions and Billions,'* Wall St. J., Oct. 9, 1998, at B6.

¹¹ *See* AT&T Merger News Release at 1; AT&T/TCI Application at 11.

¹² AT&T Merger News Release at 2 (emphasis added).

¹³ *Id.*; *see also* Opening Remarks of Leo Hindery, President, TCI, before the En
(continued...)

addition, as a result of the merger, AT&T will acquire TCI's controlling interest in @Home Network, which is the leading provider of high-speed Internet access and content services.¹⁴ By its own admission, AT&T will own and operate the most extensive and advanced communications network, the nation's largest wireless infrastructure, the Teleport local access network reaching 250 cities from coast to coast, and cable systems that pass at least 33 million homes across the United States.¹⁵ This vertically integrated AT&T with national brand name recognition undoubtedly will possess unique competitive advantages.

AT&T's actions reinforce two fundamental requirements to survive in today's communications marketplace. First, communications companies must be able to offer their customers "one-stop" shopping that now includes seamless advanced data and video services on a high-speed, broadband basis. Second,

¹³ (...continued)
Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998 (stating that AT&T/TCI "will provide the most compelling selection of high quality, high value local and long-distance telephone, video, wireless and Internet ever offered by a single entity – all under the AT&T brand name").

¹⁴ *Id.* at 3. @Home is an Internet-access joint venture with seven leading cable operators, including TCI. The combined cable networks of @Home cable partners reach approximately 40% of U.S. households and have approximately 150,000 customers. As part of the merger with TCI, AT&T has agreed to pay \$2.5 billion for TCI's 38% stake in, and voting control of, @Home.

¹⁵ *Id.* at 4.

AT&T's proposed acquisition of TCI evidences that scale is a critical – if not the essential – component for competitiveness in the global telecommunications marketplace that has emerged following enactment of the Telecommunications Act of 1996 (the "1996 Act"). AT&T's conduct demonstrates its decision not to grow complementary facilities-based businesses in house, but rather to obtain them through acquisitions of (or joint ventures with) the largest potential competitors in the various market segments (*i.e.*, McCaw Cellular, Teleport, British Telecom, Vanguard Cellular, and TCI). Indeed, the proposed merger would eliminate TCI as an actual competitor of AT&T for Internet access service and as an actual competitor in the long distance services market as a reseller of Sprint long distance.¹⁶

The recent mergers among established telecommunications service providers share a common motivating factor and competitive vision. Regardless of whether the merging parties are MCI/WorldCom, AT&T/TCI, SBC/Ameritech, or Bell Atlantic/GTE, all of these experienced telecommunications service providers are

¹⁶ See AT&T/TCI Application at 6-8 & n.9. Through the Internet capability of @Home Network, TCI likely is already competing in the long distance services market via Internet telephony. In any event, TCI in the past has expressed its intention to enter the long distance services market as a reseller. See Martin Rosenberg, *Single-Stop Communications Shopping Remains Sprint Goal*, The Kansas City Star, Feb. 24, 1996, at B1 (noting that TCI intends to resell Sprint long distance service in telephony test markets in a Chicago suburb and across Connecticut); see also Jon Van, *Risk, Rewards High in AT&T, TCI Deal*, Chicago Tribune, June 25, 1998.

simply seeking to acquire the scale and human resources necessary to create a national facilities-based footprint from which to service all of the communications needs of their customers.¹⁷

As Ameritech's Chief Executive Officer Richard Notebaert testified to this Commission:

Please understand that I am not here criticizing these business combinations. These companies understand the same realities that we understand. They are preparing to compete in the same market environment that is ahead of us. We realize that the telecommunications marketplace is moving toward a world in which two kinds of companies will have the opportunity to succeed. One will consist of 6 to 8 large international providers that offer a full range of services. The other will be a much larger number of market-focused niche players that provide services to specific customer groups.¹⁸

The pending mergers involving SBC/Ameritech and Bell Atlantic/GTE, however, do not involve the same degree of scale and vertical integration proposed by AT&T. For example, even following the proposed mergers,

¹⁷ See, e.g., MCI WorldCom Advertising Supplement, Wall St. J., Oct. 1, 1998, at R3 (touting consumer benefits of an end-to-end network for all services); AT&T Press Release announcing consummation of Teleport merger, July 23, 1998 (noting AT&T's ability to offer integrated end-to-end services with single points of contact and an integrated bill); Sprint Press Release announcing ION service, June 2, 1998 (stressing customer benefits of a truly integrated network that consolidates voice, video, and data traffic).

¹⁸ Opening Remarks of Richard C. Notebaert, CEO, Ameritech, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998.

SBC/Ameritech will not be fully vertically integrated because it does not currently have any significant long distance operations or nationwide video or Internet service access. Unlike AT&T or MCI/WorldCom, which already operate throughout the United States, SBC/Ameritech must become competitive in major markets throughout the United States where they do not now operate. Moreover, the resulting customer base of the combined AT&T/TCI will be larger than that of either SBC/Ameritech or Bell Atlantic/GTE.¹⁹ Further, based on 1997 figures, the combined revenues of AT&T/TCI/Teleport exceed those of SBC/Ameritech or Bell Atlantic/GTE.²⁰ The vertically integrated AT&T, however, may not face the pro-competitive requirements imposed on incumbent LECs by Section 251 of the Communications Act. *See* 47 U.S.C. § 251(c). And, AT&T may seek to avoid an open network and equal access approach to its deployment of advanced telecommunications capability. *See* § 706 of the 1996 Act.

Given these marketplace realities, the Commission should not tolerate an uneven regulatory playing field as industries merge and converge; rather, the

¹⁹ *See At Last Telecom Unbound*, Bus. Week, July 6, 1998, at 24 (noting that AT&T will serve over 75 million U.S. customers).

²⁰ Compare AT&T/TCI/Teleport with \$59.4 in revenues and \$93.0 in assets to SBC/Ameritech/SNET with \$42.9 in revenues and \$70.2 in assets and to Bell Atlantic/GTE with \$53.5 in revenues and \$96.1 in assets (all figures in \$ billions).

Commission should erase past regulatory boundaries. As these business combinations develop, the Commission's role cannot be to pick "winners or losers,"²¹ but to create a deregulatory environment that ensures competitive and technological neutrality. Accordingly, to the extent AT&T, including its affiliates, is offering advanced telecommunications capability (*i.e.*, high-speed, broadband voice, video, or data), it should be subject to the same regulatory requirements that apply to other providers of advanced telecommunications capability. As the Commission is well-aware, Section 706 of the 1996 Act is both provider and technology neutral. The national goal articulated in Section 706 is to make advanced services widely available to all customers – telephony, cable, data, and Internet – on a reasonable and timely basis.²²

Both AT&T and TCI have acknowledged before the Commission the need, and their intent, to make their advanced broadband capability open to competi-

²¹ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, para. 2 (rel. Aug. 7, 1998) ("The role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the demands of consumers.") (*Advanced Telecommunications Capability MO&O/NPRM*).

²² Given these marketplace realities, an uneven regulatory regime would be "unreasonable" in clear violation of Section 706 of the 1996 Act.

tors. For example, AT&T's Chairman Michael Armstrong spoke of a "level playing field in terms of access to that broadband." He also represented "we would favor the unbundling of the modem in order to provide consumers choice and lowest prices." In short, when questioned by Chairman Kennard as to how competitors could access the AT&T/TCI broadband network, Mr. Armstrong responded by "an open broadband environment with level playing field, commercial terms and conditions, common interfaces, customer choice, and lower prices."²³

Ameritech agrees that the proposed AT&T/TCI merger must be conditioned to ensure open access to the vertically integrated combination that will be created. The Commission should therefore ensure that all segments of the industry are entitled to compete on a level playing field both in terms of access to broadband facilities and to video programming.

III. THE COMMISSION SHOULD IMPOSE CERTAIN CONDITIONS ON THE GRANT OF THE MERGER TO ENSURE OPEN ACCESS TO BROADBAND FACILITIES AND SERVICES ANALOGOUS TO REQUIREMENTS IMPOSED ON INCUMBENT LECS.

The vertically integrated AT&T should not be given any additional regulatory headstart in the era of digital convergence, but rather should compete on a level playing field. Through its proposed acquisition of TCI, *AT&T will be the*

²³ Remarks of Michael Armstrong, Chairman & CEO, AT&T, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998.

largest facilities-based communications company in the United States, which possesses extraordinarily high brand name recognition by consumers nationally. Perhaps most important from a regulatory standpoint, AT&T following its acquisition of TCI will have direct facilities-based access (*i.e.*, "last mile" access) to 33 million customers' homes – one third of the local markets²⁴ – in addition to the "last mile" facilities it obtained by its acquisition of Teleport. As the Commission itself has recognized, incumbent cable television systems pass virtually every home in the United States.²⁵ Moreover, AT&T itself and through Teleport, as well as through its joint venture with British Telecom, already possesses access to substantial "backbone" facilities used for local, interoffice, long distance, and international transport.

AT&T's statements announcing the merger with TCI demonstrate that the combined AT&T/TCI represents the convergence of telecommunications and cable into an advanced services offering.²⁶ As AT&T's Chairman aptly has recog

²⁴ See Remarks of AT&T Chairman & CEO Michael Armstrong to the Economics Club of Detroit (as prepared for delivery), Sept. 29, 1998 (acquisition of "TCI will give us a path to almost one-third of all American homes").

²⁵ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187, para. 39 (rel. Aug. 7, 1998) ("Section 706 NOI").

²⁶ See generally AT&T Merger News Release. As indicated in the attached presentation by AT&T, following its acquisition of TCI, AT&T intends to
(continued...)

nized: "IP [Internet Protocol] technology . . . is literally erasing the boundaries between television sets, telephones and computers. And between those industries."²⁷ The combined AT&T/TCI thus will be an emerging advanced telecommunications service provider offering a bundled package of telephony services, Internet-based services, and traditional cable video programming services.

AT&T's vertical integration and its self-proclaimed goal of becoming an integrated end-to-end multi-product supplier underscore that service providers no longer fit neatly into discrete industry segments. Consequently, as the Commission appears to recognize, regulatory paradigms based on discrete industries and services may distort, rather than foster, competitive market conditions.²⁸ Hence, as a matter of regulatory parity, the Commission should condition its approval of the proposed AT&T/TCI merger on AT&T's compliance with unbundling and open access requirements analogous to those imposed on incumbent LECs, at least until two

²⁶ (...continued)
provide a fully integrated packet data solution for video programming entertainment, telephony, Internet-related services, and high-speed data. *See* Attachment A hereto at 4.

²⁷ *See* Remarks of AT&T Chairman & CEO Michael Armstrong to the Economics Club of Detroit (as prepared for delivery), Sept. 29, 1998.

²⁸ *See Section 706 NOI*, para. 77; *see also* Remarks of Comm'r Susan Ness Before the Consumer Federation of America Utility Conference Washington, D.C. (as prepared for delivery), Oct. 1, 1998 (stating that "as the lines between the industries blur, and technologies converge, we need to make sure our rules make sense").

active cable competitors are providing advanced services on an integrated basis. The conditions advocated by Ameritech are designed to prevent the integrated AT&T from leveraging TCI's monopoly position as an incumbent cable system operator into emerging advanced services markets.²⁹

The Commission has already required incumbent LECs to offer interconnection and unbundled access to facilities and equipment they use in the provision of advanced services.³⁰ As a matter of regulatory parity and technological neutrality in the era of digital convergence, the public interest requires that the combined AT&T/TCI, which proposes to offer an integrated package of telephony, video, and advanced broadband services, should be required to unbundle and provide open access to its network. The Commission therefore should exercise its authority in the context of this merger to impose conditions designed to promote competitive and technological neutrality.³¹ Indeed, as noted above, AT&T's Chairman in his

²⁹ See, e.g., *AT&T-TCI Merger Handed to Cable Bureau and New Chief Lathen*, Comm. Daily, Sept. 28, 1998 (FCC Cable Bureau Chief Deborah Lathen stating that FCC's recent annual cable competition report showing 87% of markets without alternate cable provider "sounds kinda monopolistic . . .").

³⁰ See *Advanced Telecommunications Capability MO&O/NPRM*, para. 11.

³¹ See, e.g., *Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc.*, Memorandum Opinion and Order, FCC 98-276, para. 13 (rel. Oct. 23, 1998); *Applications of NYNEX Corp. and Bell Atlantic Corp.*, 12 FCC Rcd 19985, paras. 180-232 (1997); *Applications of* (continued...)

recent testimony before the Commission supports the unbundling and opening of the AT&T/TCI system.³² Ameritech is simply asking that the Commission formalize AT&T's commitment to unbundle and open its network as a condition to approval of the merger.³³

A. Interconnection and Unbundling – Interconnection and Unbundling Obligations Imposed on Incumbent LECs Pursuant to Section 706 of the 1996 Act Also Should Apply to the Combined AT&T/TCI.

In the context of advanced services, incumbent cable systems and incumbent LECs equally control access to "last mile" facilities that are needed by new entrants. Hence, just as incumbent LECs are required to offer interconnection

³¹ (...continued)
Craig O. McCaw and American Telephone and Telegraph Company, 9 FCC Rcd 5836, 5873-5909 (1994).

³² See Remarks of Michael Armstrong, Chairman & CEO, AT&T, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998 (stating, in response to questioning by FCC Chairman Kennard: "[w]e will foster an open broadband strategy. . . . First, it's the right thing to do, and second, it's in our self interest"); see also *Merger Partners Tell FCC that Deals Will Create Competition*, Comm. Daily, Oct. 23, 1998, at 1 (quoting AT&T Chairman Armstrong that opening TCI's networks, like the opening of the telco networks, is "the right thing to do").

³³ See J.Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 Yale J. on Reg. 117, 119, 126 (1998) (advocating that, if regulators are to achieve the benefits of competition fairly, incumbent burdens must be either dismantled or shared equally across market participants).

with and unbundled access to the facilities and equipment used in the provision of advanced services,³⁴ AT&T and each of its affiliates, as facilities-based providers of integrated service offerings, including advanced broadband services, likewise should be required to offer unbundled access. Indeed, imposing such conditions would be consistent with the Commission's extensive history of requiring facilities-based carriers that offer, on an integrated basis, enhanced/information services in conjunction with basic telecommunications services to unbundle the underlying network services.³⁵

For example, due to its control of TCI's incumbent cable network facilities, AT&T should be required to provide unbundled access to the backbone fiber optic distribution network connecting its headends to the various regional centers within TCI's network and to its hybrid-fiber-coaxial (or HFC) facilities between such headends, nodes, and customer locations to facilitate entry by compet-

³⁴ See *Advanced Telecommunications Capability MO&O/NPRM*, paras. 11, 46-49, 52-56, 57 (concluding that incumbent LECs are subject to interconnection and unbundling obligations with respect to facilities and equipment used in the integrated provision of advanced services).

³⁵ See, e.g., *Independent Data Communications Manufacturers Assoc.*, 10 FCC Rcd 13717, 13725 (1995) (directing AT&T and common carriers to unbundle frame relay "basic" telecommunications services from enhanced data services); *Advanced Telecommunications Capability MO&O/NPRM*, para. 37 (citing *Computer Inquiry* and *Open Network Architecture* proceedings as examples of prior unbundling).

ing telecommunications carriers or multichannel video programming service providers. Through unbundled transport, competing providers of multichannel video programming services would obtain end-to-end transport to a specified destination of a formatted digital signal provided by the requesting service provider at a specified source location. Unbundled access to the AT&T/TCI fiber distribution backbone would facilitate direct competition with incumbent cable systems. And, as the Commission undoubtedly must recognize, such direct competition with incumbent cable systems is imperative if consumers are ever to see downward pressure on cable rates.

Finally, pursuant to Section 706 of the 1996 Act, the Commission has recently sought comment on whether to impose strengthened collocation, local loop, and unbundling requirements on incumbent LECs to promote further entry into the advanced services market.³⁶ To the extent that the Commission ultimately decides to impose additional obligations as part of the Section 706 advanced services initiatives,³⁷ Ameritech submits that AT&T should be required to comply with any such unbundling and collocation requirements due to its control of the "last mile"

³⁶ See *Advanced Telecommunications Capability MO&O/NPRM*, FCC 98-188, paras. 123-150 (collocation), 154-177 (local loop requirements), 180-184 (further unbundling).

³⁷ In the *706 NPRM and NOI*, Ameritech has not supported additional or new regulations on new investment in advanced telecommunication capability.

facilities of an incumbent cable system operator. Absent analogous requirements imposed on AT&T as a condition of merger approval, the Commission improperly will be pre-determining winners – or at minimum, creating for AT&T substantial advantages – in the bandwidth race.

B. *Collocation for Cable Modem Service – AT&T Should Be Required To Allow Competitors to Collocate Equipment at AT&T/TCI Headends.*

The Commission should require AT&T to allow competing Internet Service Providers ("ISPs") or other competitors to locate cable-modem termination equipment, such as router/proxy servers,³⁸ at AT&T/TCI cable headends and, through open interfaces, use the AT&T/TCI distribution network to deliver the signal to subscribers. The Commission also should permit the collocation of fiber optic transmission interface equipment to enable competitors to terminate and interconnect their transmission facilities with AT&T/TCI's fiber optic facilities. As the Commission recently has tentatively concluded, incumbents should not be allowed to impede

³⁸ According to AT&T, a "router/proxy server" (which appears to provide a similar function to that provided by digital subscriber line asynchronous multiplexer ("DSLAM")) is installed in the cable headend. In a traditional high-speed cable upgrade the route/proxy server simply would route an end user's personal computer to the customer's ISP. In a fully integrated packet data solution, the router/proxy server could route both to a voice packet network and in different ISP packet network. See "Transformation of a Traditional Cable TV System to a Full Service, Consumer Communication Network," AT&T Investor Presentation, dated June, 1998, at 3-4, attached hereto as Attachment A.

competing providers of advanced services by imposing unnecessary collocation restrictions.³⁹ By requiring AT&T to provide collocation for cable modem service, the Commission would ensure that unaffiliated ISPs are not denied the opportunity to compete with AT&T and its affiliated ISPs.

C. *Access to Multiple ISPs – AT&T Should Be Required to Provide Access to "Last Mile" Infrastructure to Unaffiliated ISPs on a Nondiscriminatory Basis.*

As recently proposed in response to the *Section 706 NOI*, the Commission should require the combined AT&T/TCI to allow its cable modem service subscribers to select and access any ISP they desire.⁴⁰ This condition is analogous to the equal access obligations pursuant to which incumbent LECs are required to provide local exchange customers with access to the long-distance carrier of their choosing.⁴¹ This condition would not require costly reconfiguration of the TCI-controlled cable system. The combined AT&T/TCI simply would need either to add or modify "router/proxy servers" in their cable headends to connect the subscriber with the facilities of the subscriber's preferred ISP. Indeed, this proposed condition

³⁹ See *Advanced Telecommunications Capability MO&O/NPRM*, para. 129.

⁴⁰ See Comments of America Online, Inc., CC Docket 98-146, dated Sept. 14, 1998, at 9-10; Comments of America Online Inc., CC Docket 98-146, dated Oct. 8, 1998, at 6; Comments of Circuit City Stores, Inc., CC. Docket 98-146, dated Sept. 14, 1998, at 11-13.

⁴¹ See 47 U.S.C. § 251(g).

simply formalizes what AT&T and TCI have already committed to do. Specifically, at the recent en banc hearing of the Commission, AT&T's Chairman Michael Armstrong stated that "our open broadband would be predicated on customer choice and that the broadband facilities would be an open gateway to the Internet" ⁴² Similarly, in response to questioning by Commissioner Ness, TCI's President Leo Hindery agreed that an AT&T/TCI customer should not have to pay twice, effectively for the same service, to access a different online service provider than @Home. ⁴³ Thus, both AT&T and TCI appear to concede that AT&T/TCI subscribers should not be forced to pay for the Internet services of @Home simply to access the ISP of their choice. ⁴⁴

Requiring such competitive access to the AT&T/TCI controlled "last mile" facilities, as advocated by Ameritech, would guarantee that consumers will not

⁴² Remarks of Michael Armstrong, Chairman & CEO, AT&T, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998.

⁴³ Remarks of Leo Hindery, President, TCI, before the En Banc Hearing of the Commission on Telecommunications Mergers, on Oct. 22, 1998.

⁴⁴ *See Executives Defend Mergers as Pro-Consumer Say Industry Is Consolidating to Few Global Players*, Telecomms. Rep., Oct. 26, 1998, at 11 (TCI President Leo Hindery adding that AT&T/TCI platform would offer "complete neutrality" for online services). *Merger Partners Tell FCC that Deals Will Create Competition*, Comm. Daily, Oct. 23, 1998, at 1 (Mr. Hindery agreeing with Commissioner Ness that a subscriber should be able to choose an ISP other than the TCI affiliate @Home without paying for two services).

be forced to purchase the services of AT&T's affiliated ISP as the price of admission to their preferred ISP. Absent such a condition, the proposed merger creates significant incentives for AT&T to favor its affiliated ISP and thus erect toll booths to consumer access to the Internet.

D. *Resale – AT&T Should Be Required to Offer for Resale at Wholesale Rates Any Advanced Services Offered to Subscribers That Are Not Telecommunications Carriers.*

The Commission recently has declared that pursuant to Section 251(c)(4) incumbent LECs providing advanced services on an integrated basis must offer for resale, at wholesale rates, any advanced services that the incumbent LEC offers to subscribers that are not telecommunications carriers.⁴⁵ Similar to incumbent LECs, AT&T following the merger with TCI will control access to "last mile" facilities and plans to offer an integrated package of cable, telephony, and advanced services. Accordingly, for the reasons discussed in Section III.A. above, to the extent that AT&T provides advanced services, or other video programming services, on an integrated basis using the TCI cable network facilities, the Commission should require AT&T to offer its advanced services and video programming and other programming services for resale at wholesale rates.

⁴⁵ *See Advanced Telecommunications Capability MO&O/NPRM*, para. 50.

E. *Access to Poles, Ducts, Conduits, and Rights-of-Way – The Commission Should Require AT&T To Provide Access to the Poles, Ducts, Conduits, and Rights-of-Way Controlled by TCI in Accordance with Section 224.*

Section 224(f) of the Communications Act confers on telecommunications carriers (other than incumbent LECs) and cable television system operators nondiscriminatory access to any pole, duct, conduit, or right-of-way controlled by a "utility." 47 U.S.C. § 224(f). The utilities obligated to provide such access include any local exchange carrier or any electric, gas, water, steam, or other public utility that owns or controls poles, ducts, conduits, or rights-of-way used for wire communications. 47 U.S.C. § 224(a)(1).

After its merger with TCI, AT&T will be a vertically integrated telecommunications service provider that controls access to incumbent cable "last mile" facilities. Those AT&T/TCI facilities fall within the spirit, if not the letter, of the definition of "utility" contained in Section 224. Accordingly, the Commission should condition its approval of the AT&T/TCI merger on AT&T's affirmative commitment to provide non-discriminatory access, in accordance with the requirements of Section 224, to ducts, conduits, and rights-of-way owned or controlled by TCI. Indeed, to the extent AT&T currently provides local exchange service, AT&T already is subject to the duty to afford access to poles, ducts, conduits, and rights-of-way to competing providers of telecommunications services on rates, terms, and

conditions that are consistent with Section 224. *See* 47 U.S.C. § 251(b)(4). The explicit imposition of this condition would prevent AT&T from attempting to evade its obligation by concocting an argument that providers of services, which are functionally equivalent to local exchange service but which are provided via cable infrastructure, are somehow exempt from statutory requirements imposed on *all* local exchange carriers.

IV. THE COMMISSION SHOULD IMPOSE PROGRAM ACCESS CONDITIONS TO ENSURE THAT THE AT&T/TCI MERGER DOES NOT RESTRICT ACCESS TO VIDEO PROGRAMMING BY ALTERNATIVE PROVIDERS OF MULTICHANNEL VIDEO PROGRAMMING.

AT&T's proposed acquisition of TCI could imperil nascent competition in the MVPD market by threatening to restrict severely new entrants' access to popular, quality video programming they need to compete effectively with incumbent cable operators. Historically, TCI and Liberty have not hesitated to exploit any real or perceived gap in the Commission's program access regime, and to assert the most narrow and radical interpretations of the program access provisions, in order to afford TCI and its affiliated cable systems exclusive or preferential access to popular video programming. The proposed merger could enable Liberty to evade the program access rules, and therefore to deny new entrants access to critical video programming controlled by Liberty, in at least two ways.

First, the structure of the merged entity could enable AT&T/TCI to avoid the strictures of the program access rules by asserting that Liberty is effectively an independent entity, and therefore should not be treated as vertically integrated with TCI's cable systems for purposes of the program access rules.⁴⁶ Second, even if Liberty is still vertically integrated, by combining TCI's cable system assets with AT&T's fiber transport and distribution backbone facilities, the proposed merger will enable AT&T/TCI to circumvent the program access regime by delivering programming terrestrially rather than via satellite.⁴⁷

It is unclear from AT&T/TCI's application whether AT&T's interest in Liberty will, technically speaking, be attributable under the Commission's cable attribution rules because AT&T has not disclosed in its application who will actually own shares of Liberty Media Corporation ("LMC"), which will manage Liberty. Moreover, AT&T has asserted that Liberty will be "operational[ly] independen[t]" of AT&T.⁴⁸ AT&T has, however, acknowledged that it will be the "legal owner of the

⁴⁶ Section 628, which establishes the program access regime, generally does not apply to satellite cable programming vendors unless they are vertically integrated with a cable operator. *See* 47 U.S.C. § 548.

⁴⁷ Section 628 also generally does not apply to non-satellite delivered cable programming. 47 U.S.C. § 548.

⁴⁸ AT&T/TCI Application at 12.

assets and businesses of the Liberty Media Group."⁴⁹ Additionally, John Malone will be a director of AT&T, the Chairman of LMC, one of the largest non-institutional shareholders in AT&T, and reportedly the largest shareholder in LMC following the merger. Under these specific circumstances, Ameritech believes that, following the merger, Liberty still will be effectively (if not technically, under the Commission's rules) vertically integrated with TCI, and therefore should be subject to the program access rules.

The Commission should condition its approval of the proposed AT&T/TCI merger on AT&T/TCI's and Liberty's compliance with certain conditions designed to ensure that Liberty does not offer preferential rates, terms and conditions for access to video programming to AT&T/TCI's cable systems. Specifically, based on the facts presented in AT&T's application, the Commission should find that Liberty will be vertically integrated with AT&T/TCI following the merger, and therefore subject to the full panoply of program access requirements. Additionally, AT&T should commit that Liberty, or any other programming subsidiary of AT&T or TCI, will provide MVPD new entrants, like Ameritech, access to all programming on the same rates, terms and conditions as those offered to TCI or any of its cable affiliates in such new entrant's markets, regardless of whether such programming is

⁴⁹ *Id.* at 10-11 n.19.

delivered terrestrially. AT&T should also commit to waive any existing exclusive program access agreements between TCI and other cable programming networks, and that it will not conclude any new exclusive programming agreement for at least five years. Finally, AT&T should commit to submit any proposed restructuring of Liberty to the Commission for public comment and approval to ensure that any such restructuring is not merely a sham to evade the program access rules. The program access provisions, which direct the Commission to take steps necessary to enable new entrants to obtain reasonable, non-discriminatory access to critical video programming,⁵⁰ provides the Commission ample authority to require such conditions in order to address the significant potential for anticompetitive conduct posed by the AT&T/TCI merger.

A. The AT&T/TCI Merger Threatens to Deny Alternative MVPDs Access to Programming They Need to Compete in MVPD Markets.

As the Commission is aware, TCI, through Liberty, a wholly-owned subsidiary of TCI, has significant ownership interests in numerous national cable programming networks. Earlier this year, the Commission reported that Liberty held ownership interests in 39 national cable programming networks (or 23 percent of all such networks), including purveyors of some of the most popular and valuable cable

⁵⁰ See 47 U.S.C. § 548.

programming, including The Discovery Channel, Fox Sports, BET, and fX.⁵¹ A more recent industry survey reported that Liberty holds interests in more than 70 national, regional and international cable networks.⁵² Liberty, and therefore TCI (and AT&T post-merger), thus has vertical ties to many of the most important cable programming networks, which must be included on a system's line up for the system to compete effectively in the multichannel video distribution marketplace.

TCI also has extensive, overlapping ownership, and other partnership or joint venture, interests throughout the cable industry. TCI, for example, owns 50 percent of Lenfest Communications, Inc. ("LCI"), which owns and controls cable systems in Pennsylvania, New Jersey and Delaware. This interest affords LCI the right to utilize TCI's negotiated rate structure for programming, and "the buying power advantages of TCI" in its purchase of technology.⁵³ TCI has similar interests

⁵¹ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, FCC 97-423 at 161 (Jan. 13, 1998) (*Fourth Annual Report*).

⁵² Paul Kagan Associates, Cable Program Investor, July 7, 1998.

⁵³ Joint Comments of Adlephia Communications Corporation, Falcon Holding Group, L.P., Insight Communications Company, L.P. and Lenfest Communications, Inc. in *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits; Implementation of Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules*, MM Docket No. 92-264, CS Docket No. 98-82 at 19 (filed Aug. 14, 1998).

in other MSOs.⁵⁴ Although these ownership and other relationships may not be attributable under the Commission's program access rules, they nevertheless create a strong incentive in Liberty to afford preferential program access to such affiliated cable operators.

Although AT&T claims that the proposed merger was structured "to establish and preserve the Liberty Media Group as a separately managed business group," it has acknowledged that AT&T will be the actual, legal owner of all of the assets and businesses of Liberty. In addition, TCI-appointed directors will continue to control the board of LMC, which, in turn, will control and manage the business of Liberty Media Group for at least seven years following the merger.⁵⁵ John Malone, TCI's current chairman and CEO, will moreover serve as chairman of Liberty Media

⁵⁴ TCI also jointly, with Adelphia Communications Corporation, owns Parnassos, L.P., which consists of a 465,000 regional subscriber cluster and includes a regional sports network in the Buffalo, New York ADI. *Id.* at 15. Similarly, TCI has agreed with Falcon Holding Group, L.P., to establish a new partnership, in which TCI will hold a 47 percent equity interest, that will serve approximately 1 million subscribers across the country. *Id.* at 9-10. In addition, subsidiaries of TCI own shares representing 33.2 percent of the equity in Cablevision Systems Corporation ("CSC") and an approximate 9 percent voting interest in CSC in all but two matters, which include the election of directors (TCI effectively has the right to designate two of CSC's directors). Tele-Communications, Inc., Form 10-Q at I-10 (filed Aug. 14, 1998).

⁵⁵ AT&T/TCI Application at 12-13.

Group and also as a director of AT&T.⁵⁶ John Malone will also be one of the largest, if not the largest, non-institutional investors in AT&T, and, reportedly, a majority shareholder in LMC. And, according to recent SEC filings by TCI, "the AT&T Agreement contemplates the execution of certain agreements . . . which will, among other things, (i) provide preferred vendor status to the Liberty/Ventures Group for digital basic distribution on AT&T's systems of new programming services created by Liberty/Ventures Group and its affiliates, (ii) provide for the renewal of existing affiliation agreements of the Liberty/Ventures Group and its affiliates, and (iii) provide interactive video services to the Liberty/Ventures Group."⁵⁷ As a consequence, despite AT&T's assertions regarding Liberty's purported "independence" from AT&T and TCI post-merger, Liberty will have a strong incentive to offer preferential rates, terms and conditions for programming (or indeed exclusive programming arrangements, to the extent it can get away with it) to TCI both because of AT&T's concurrent ownership of TCI and the assets and businesses of Liberty, and because of Dr. Malone's significant ownership interest in TCI through his ownership of shares in AT&T.⁵⁸ By doing so, Liberty can maximize the profits

⁵⁶ *Id.*

⁵⁷ Amendment No. 1 to Form S-4 Registration Statement Under the Securities Act of 1933, Tele-Communications, Inc., at 54 (filed October 14, 1998).

⁵⁸ Because of Dr. Malone's interests in AT&T (both as a significant shareholder
(continued...))

of the overall firm by raising the programming costs of TCI's rivals, and allowing TCI to charge supracompetitive prices.

The proposed merger of AT&T and TCI will not only not eliminate Liberty's incentive to discriminate in favor of TCI, as AT&T implies in its application, it will afford Liberty the means to do so with impunity by exploiting gaps in the Commission's existing program access rules. Most significantly, the merger will enable Liberty to exploit one of the most glaring gaps in the program access regime - the limitation of the rules to satellite delivered programming - to provide preferential program access to TCI.

Because section 628 generally does not apply to non-satellite delivered cable programming, vertically integrated multiple system operators ("MSOs") like TCI, and AT&T post-merger, may be able to avoid the requirements of the program access rules by delivering programming terrestrially. With the merger of

⁵⁸ (...continued)
and director), he will have a strong incentive to provide preferential access to popular programming to AT&T/TCI in order to limit competition to its cable systems, and thus increase the value of his interest in AT&T. Indeed, Liberty is already offering lower rates, and preferential terms and conditions for programming to incumbent cable operators. *See* Comments of Ameritech New Media, Inc. in *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits; Implementation of Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Cable Attribution Rules*, MM Docket No. 92-264, CS Docket No. 98-82 (filed Aug. 14, 1998).

AT&T and TCI, Liberty and TCI will have access to all of AT&T's and TCG's fiber optic transmission facilities. Consequently, Liberty will be able cost-effectively to divert its programming off satellite to AT&T's fiber optic network for delivery to TCI's affiliated, down-stream cable systems. Following the merger, Liberty therefore will be able to avoid its non-discrimination obligations under Section 628 and thus undermine the ability of Ameritech and other alternative MVPDs to compete effectively with TCI.

AT&T may also be able to exploit another gap in the program access rules for programming arrangements between cable programmers and unaffiliated cable operators. The program access regime generally applies only to cable operators and satellite cable programming vendors in which a cable operator has an attributable interest.⁵⁹ In its application, AT&T asserts that the proposed merger was structured to establish and preserve the purported "operational independence" of Liberty following the merger.⁶⁰ In addition, it states that AT&T will own the assets

⁵⁹ 47 U.S.C. § 548(b). The program access requirements also apply to satellite broadcast programming vendors. *Id.*

⁶⁰ AT&T/TCI App. at 12. *See also id.* at 13 (stating that, in structuring the transaction, "one of the intentions of the Merger Parties was to separate the performance of the Liberty Media Group's businesses from those of AT&T's other businesses").

and businesses of Liberty,⁶¹ but does not disclose who will actually own the shares of LMC, which will manage Liberty. Although it does not say as much, AT&T seems to be setting itself up to argue either that AT&T/TCI will not have an attributable interest in Liberty, or that Liberty effectively will be an independent entity, which should be treated as if it is not vertically integrated with a cable operator, and thus not subject to the program access rules. Were the Commission to accept either of these arguments, and treat Liberty as non-vertically integrated for purposes of the program access rules, Liberty would have not only the incentive,⁶² but also the ability to favor its downstream cable affiliates by denying alternative MVPDs access to valuable programming or supplying access only at discriminatorily high prices.

Even if AT&T is ultimately unsuccessful in its attempt to avoid the program access requirements by asserting Liberty's independence under the terms of this transaction, it could always further restructure Liberty so that it is not, technically, vertically integrated with the TCI cable systems, but still has an incentive to provide exclusive or preferential access to its programming to TCI. As the attached article and indeed the structure of this transaction itself demonstrate, under Dr.

⁶¹ *Id.* at 10-11 n.19.

⁶² As discussed above, despite AT&T's and TCI's efforts to insulate Liberty, Liberty will have a strong incentive to offer preferential rates, terms and conditions for programming to TCI.

Malone's management, "keeping a close tab on exactly what Liberty is and what it has been is no easy matter."⁶³ In either event, by raising the costs of TCI's rivals, and denying them the ability to assemble attractive packages of video programming, Liberty could effectively restrict, if not eliminate altogether, competition to TCI's cable systems.

Where TCI has had an opportunity to exploit loopholes in the program access regime to extract exclusive or preferential program access arrangements, it has not hesitated to do so. For example, TCI has an agreement with Tribune Broadcasting ("Tribune") that effectively affords TCI exclusive distribution rights for Tribune's highly popular CLTV network, a 24-hour cable news channel in the Chicago area that carries a number of Chicago Cubs games. This arrangement is not subject to the program access requirements both because Tribune is not affiliated with a cable operator, and because CLTV is delivered terrestrially to TCI. TCI also has concluded exclusive programming agreements for other, increasingly popular cable networks, like MSNBC, Fox News, and TV Land. The anticompetitive effects of these arrangements are exacerbated for cable networks like MSNBC and Fox News because such networks' affiliated broadcast stations and other popular cable

⁶³ Geraldine Fabrikant, *Tracking the Rich Deals of TCI's Chairman Is No Easy Job*, THE NEW YORK TIMES, Section D at 1 (July 27, 1998) (Attachment B).

programs, which are carried by new entrants like Ameritech, heavily promote them. Consequently, new entrants effectively are forced to promote the exclusive multi-channel video services of their incumbent rivals.

TCI has been able to extract such concessions largely because of its position as an incumbent cable operator, and therefore its control over substantial numbers of subscribers. These exclusive arrangements deny Ameritech and other new entrants access to popular, quality programming networks, and place them at a distinct disadvantage in assembling appealing packages of video programming. Such arrangements therefore seriously limit any new entrant's ability to compete effectively based on service quality, and perpetuate incumbent cable operators' dominance in the market for multichannel video programming.

B. The Commission Should Condition Approval of the Proposed AT&T/TCI Merger on AT&T's Commitment to Comply with Certain Program Access Conditions.

Because AT&T's proposed acquisition of TCI threatens to enable Liberty to restrict severely the access of alternative MVPDs to essential video programming, the public interest demands that the Commission require AT&T, and its subsidiaries, to comply with the following four conditions: As an initial matter, and based on the facts presented in AT&T's application, the Commission should find that, following the merger, Liberty will be vertically integrated with AT&T/TCI, and therefore subject to the full panoply of program access requirements, regardless of

AT&T/TCI's attempts to structure the merger so as to establish Liberty's purported "operational independence."

Second, the Commission should require Liberty, or any other programming subsidiary of AT&T or TCI, to provide alternative MVPDs access to programming on the same rates, terms and conditions as those offered to TCI, or any other AT&T subsidiary or TCI affiliate engaged in the provision of multichannel video programming services, in such new entrants' markets, regardless of whether such programming is delivered terrestrially.⁶⁴ Absent such a condition, the proposed merger will provide Liberty the ability to act on its clear incentive to afford preferential or exclusive program access to AT&T/TCI and affiliated cable operators. This condition will, moreover, guarantee that Liberty will not attempt to circumvent the program access regime by delivering programming terrestrially to its downstream cable system affiliates.

Third, the Commission should condition approval of the merger on AT&T's commitment that AT&T/TCI will waive any existing exclusive program

⁶⁴ If, despite the numerous ties between AT&T/TCI and Liberty, the Commission concludes that Liberty would not be "vertically integrated" with AT&T/TCI, the Commission should condition its approval of the merger on Liberty's commitment that it will provide alternative MVPDs access to programming on the same rates, terms and conditions as those offered to AT&T/TCI or any of its cable affiliates in such MVPDs markets. This condition also should apply regardless of whether such programming is delivered terrestrially.

access arrangements between TCI and Liberty or other cable programming networks, and that it will not enter into any new exclusive arrangement for at least five years. Without such conditions, AT&T/TCI will continue to exercise its program exclusivity rights derived from its position as an incumbent cable operator, to the detriment of alternative MVPDs and cable competition generally. Imposing such conditions will secure the benefits of robust competition in TCI's franchise areas, as Congress intended, by providing new entrants access to essential video programming.

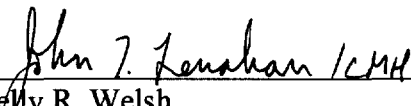
Finally, the Commission should require AT&T to commit to submit any proposed restructuring of Liberty to the Commission for public comment and approval to ensure that any such restructuring is not merely a sham to evade the program access rules. Without such a commitment, AT&T could restructure Liberty or nominally divest Liberty in a manner that would remove Liberty from the program access regime without reducing or eliminating its incentive to favor TCI. By requiring AT&T to submit any proposed restructuring of Liberty, including the sale of all or substantially all of its programming assets, to the Commission for prior approval, the Commission can ensure that such a transaction is not a sham, and that

alternative MVPDs can obtain access to programming they need to compete effectively in multichannel video programming markets.

V. CONCLUSION

For the foregoing reasons, Ameritech requests that the Commission condition its consent to the proposed merger between AT&T and TCI on AT&T's compliance with certain requirements designed to ensure, as a matter of regulatory parity and technological neutrality, that the vertically integrated AT&T will not erect anti-competitive barriers to new entrants in the cable, long distance, local telephony, and advanced services markets.

Respectfully submitted,



Kelly R. Welsh
John T. Lenahan
Counsel for Ameritech
30 S. Wacker Drive
39th Floor
Chicago, Illinois 60606
(312) 750-5367

Christopher M. Heimann
Counsel for Ameritech
1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
(202) 326-3818

Dated: October 29, 1998

ATTACHMENT A



Transformation of a Traditional Cable TV System to a Full Service, Consumer Communications Network

June 1998



"Safe Harbor" Disclosure

The following contains forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995, possibly including but not limited to statements concerning future operating performance, AT&T's share of new and existing markets, AT&T's short- and long-term revenue and earnings growth rates, and general industry growth rates and AT&T's performance relative thereto. The forward-looking statements are based on management's beliefs as well as on a number of assumptions concerning future events. Readers are cautioned not to put undue reliance on such forward-looking statements, which are not a guarantee of performance and are subject to a number of uncertainties and other factors, many of which are outside AT&T's control, that could cause actual results to differ materially from such statements. Among other things, such uncertainties and other factors include competitive pressures, including the timing and level of RBOC entry into long-distance; and the ability to offer, and the success and market acceptance of, new products and services, including local service. For a more detailed description of the factors that could cause such a difference, please see AT&T's filings with the Securities and Exchange Commission. AT&T disclaims any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise



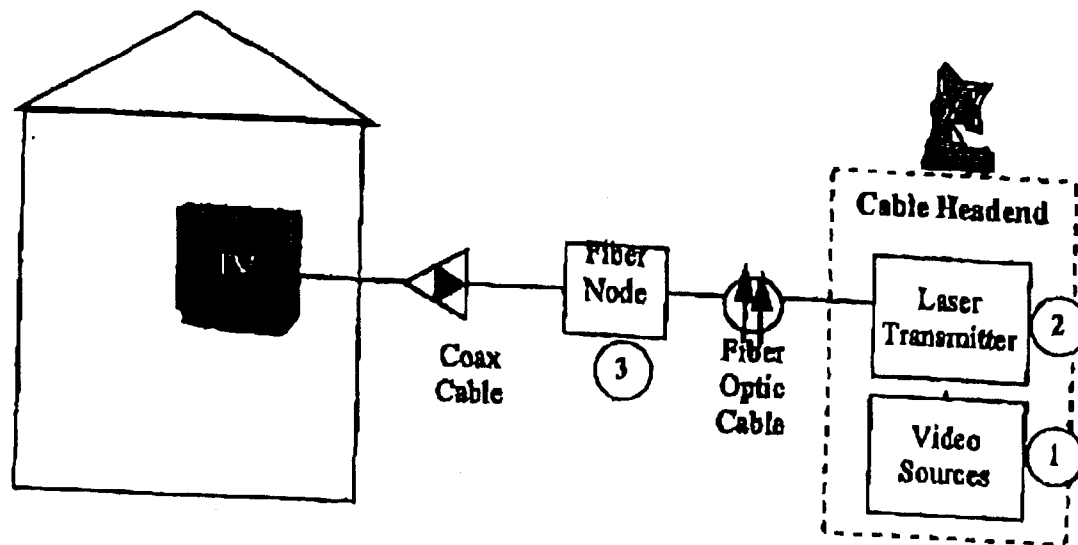
Contact Information

Investors and Equity Analysts: 908-221-3655

Industry Analysts: 908-221-4120

Media: 908-221-2737

Traditional One-Way Cable TV System

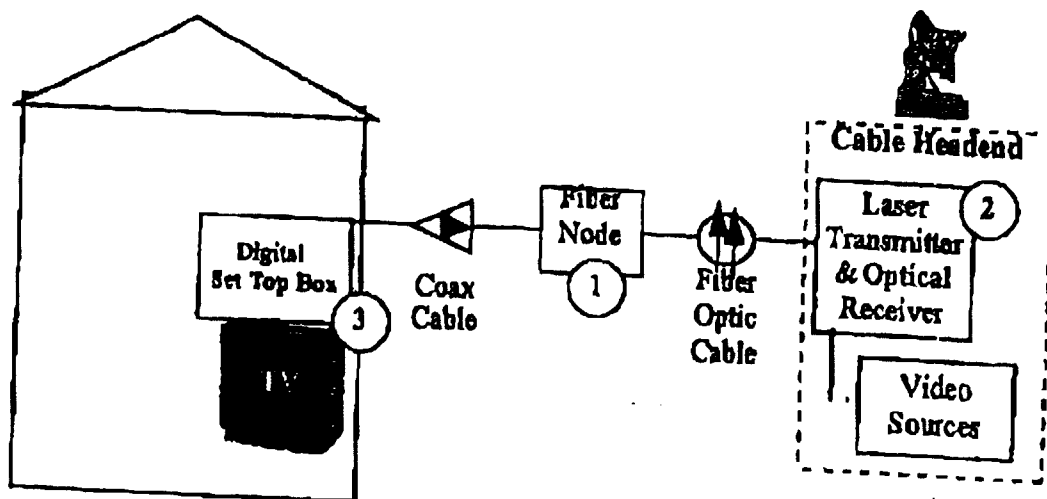


- ① Various Sources of Programming including Satellite Services, Local Programming, etc. are Consolidated for Distribution
- ② Lasers Transmit Signals from the Video Sources One-Way, Downstream to the Home
- ③ Fiber Nodes Connect the High Capacity Fiber Optic Cable from the Cable Headend to the Lower Capacity Coax Cable that Runs into the House. Each Fiber Node Serves from 2,000 to 10,000 Homes

Services Provided

- 40-80 Channels of Analog Video Entertainment

Upgrade of Cable System to Increase Capacity and Create Two-Way Capabilities

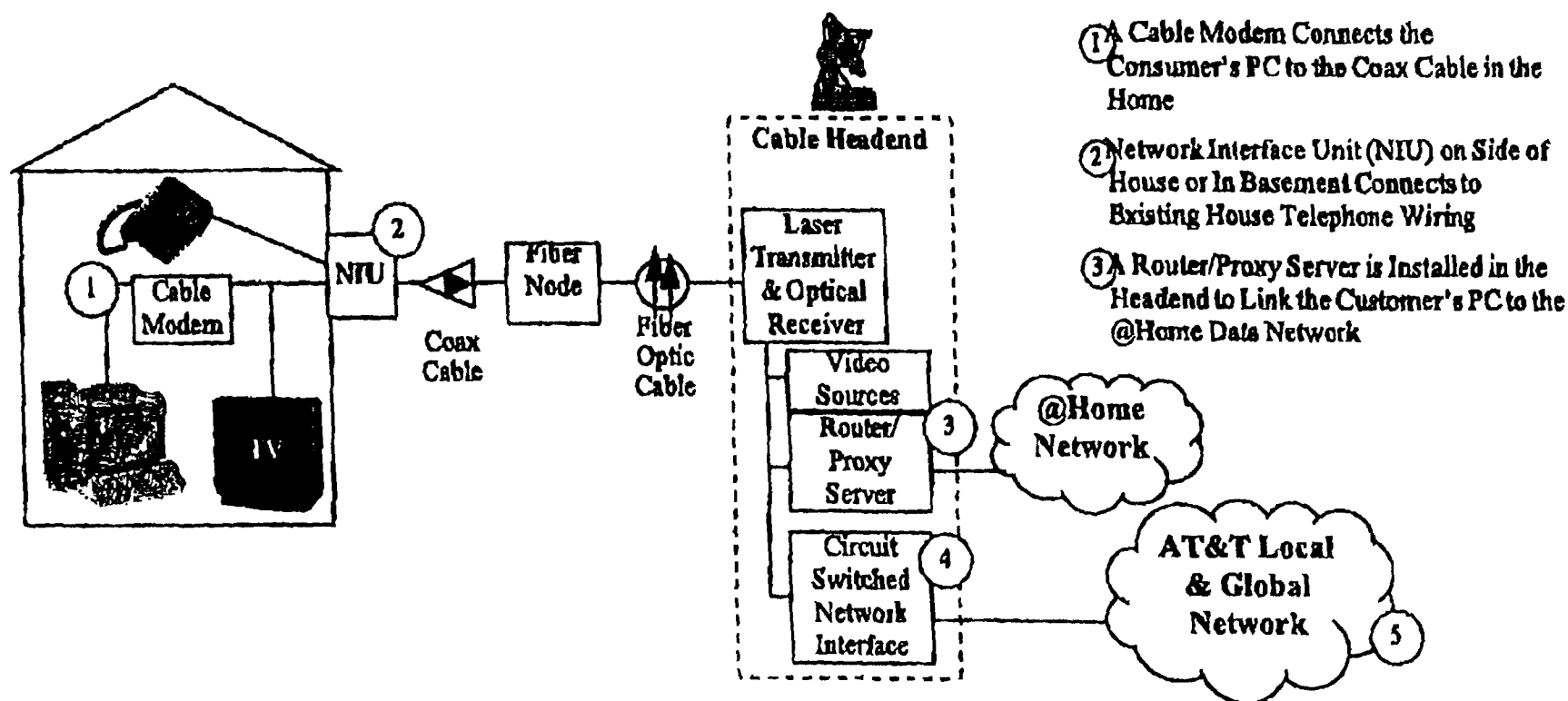


- ① The Higher Capacity Fiber Optic Cable is Brought Closer to the Customer – Each Fiber Node Now Serves an Average of 600 Homes
- ② Optical Receivers are Added to the Cable Headend to Create a Two-Way Transmission Path Between the Home and Headend
- ③ First Generation Digital Set Top Box Installed to Support Expanded Entertainment Offers

Additional Customer Benefits

- Capacity for 300+ Channels of Video Entertainment, Including Interactive Video Services
- 59% of TCI Households Upgraded by Year End 1999; 90% Upgraded by Year End 2000

Traditional Telephone Service and High Speed Data Over Upgraded Cable System Using Off-the-Shelf Equipment



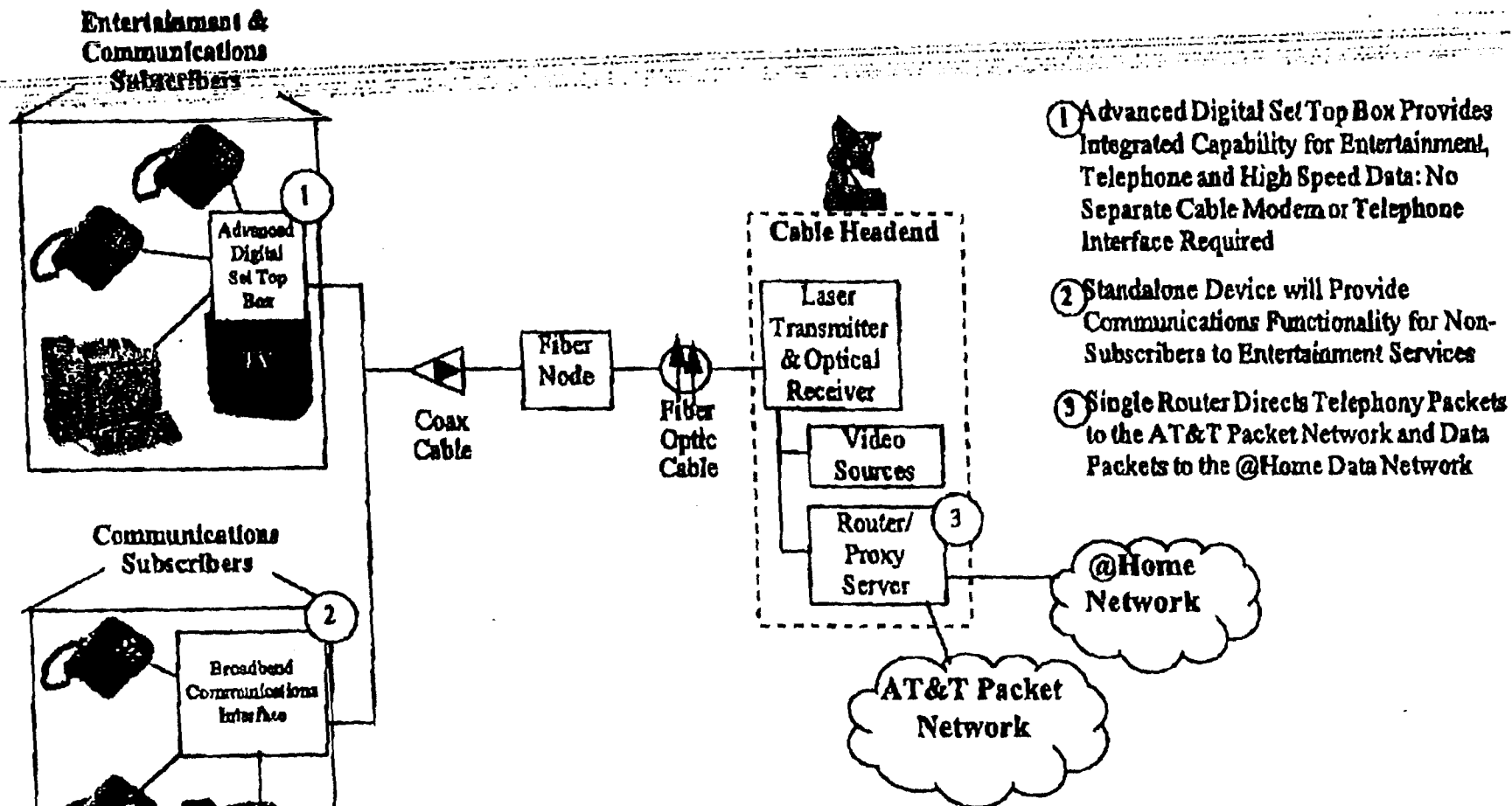
- ① A Cable Modem Connects the Consumer's PC to the Coax Cable in the Home
- ② Network Interface Unit (NIU) on Side of House or In Basement Connects to Existing House Telephone Wiring
- ③ A Router/Proxy Server is Installed in the Headend to Link the Customer's PC to the @Home Data Network

Additional Customer Benefits

- High Quality, Full-Featured Telephone Service
- Access to the Unique Content of the @Home Service and to the Internet at Speeds of 300 Times the Traditional Telephone Lines
- Rapid Rollout Possible in Selected TCI Markets Based on Off-the-Shelf Premises and Headend Equipment

- ④ Interface to Circuit Switched Telephone Network Added to Cable Headend
- ⑤ Existing & Planned TCG Local Switches Are Used to Provide Local Service and Long Distance Access to AT&T Global Network

Fully Integrated Packet Data Solution



Additional Customer Benefits

- Attractively Priced, Multiple Voice Lines with New Features Such as Distinctive Ringing Based on Person Called; Point & Click Provisioning of Additional Lines
- "Always-On" Internet Access at Various Speeds Depending Upon Customer Needs
- Rollout Begins Before Year End 2000

Summary of Estimated Capital by Category AT&T

Upgrade for Capacity
and Two-Way (1998 - 2000)

\$1.8B

Notes

Post Close Capital = \$1.3B

Maintenance and Line
Extensions (1999 - 2002)

\$1.3B

\$35/Year/Video Sub = \$350M Annually $\times 4$ yr

Digital Devices
(10.5M Devices Deployed)

\$1.8B

\$175 Net/Video Sub

Telephony Capability
(30% Penetration of 17M HP =
5M HP)

Subject to Demand

\$400 - \$500/IP Telephony Sub
(for Non-Video Customers)

Subject to Demand

\$300 - \$400/IP Telephony Sub
(for Video Customers)

ATTACHMENT B

1ST STORY of Level 1 printed in FULL format.

Copyright 1998 The New York Times Company
The New York Times

July 27, 1998, Monday, Late Edition - Final

NAME: John C. Malone

SECTION: Section D; Page 1; Column 2; Business/Financial Desk

LENGTH: 1344 words

HEADLINE: THE MARKETS: Market Place;

Tracking the Rich Deals of TCI's Chairman Is No Easy Job

BYLINE: By GERALDINE FABRIKANT

BODY:

Score another one for John C. Malone, the chairman of Tele-Communications Inc.

Not only did he strike a savvy deal for himself in selling the huge cable television operator to the AT&T Corporation, he also reaped some extraordinary benefits for a part of the TCI empire that he will still control: the Liberty Media Corporation. Liberty will get a tax loss of roughly \$1.8 billion that can be used to offset future tax bills, and it will get the right to borrow billions without seeking permission from AT&T.

For anyone trying to value Liberty, which is the cable programming arm of TCI with stakes in many companies, the job just keeps getting harder. And as Mr. Malone's financial plan unfolds piece by piece, it is worth remembering that his deals are rarely transparent.

Without a doubt, Mr. Malone's financial performance has been stunning. His initial investment of \$42 million in Liberty Media seven years ago would be worth more than 40 times that today, or \$1.76 billion, though he has sold some shares in the interim.

Not all his shareholders have done so well. Two-thirds of the shareholders of Tele-Communications passed up the chance to take a stake in Liberty when he spun it off in 1991. At the time, one stock analyst suggested that by making the spinoff so complex, Mr. Malone discouraged investors and wound up with more Liberty shares for himself. A TCI investor who participated in the initial Liberty offering, admittedly a risky one, has made 10 times as much money as one who just held on to the TCI stock.

Mr. Malone, who was traveling last week and did not return phone calls, was recently quoted in Broadcasting and Cable, a trade publication, as saying that he needed "a corner somewhere where I can just sit and scheme. Come up with creative, structural ideas, technical or financial -- that's me, that's my

The New York Times, July 27, 1998

personality."

Robert R. Bennett, president of Liberty Media, says Mr. Malone is the primary financial architect of his deals even though he works with associates and investment bankers. Mr. Bennett also noted that all TCI investors had the chance to participate in the Liberty spinoff and that even those who did not had enjoyed strong stock gains.

Mr. Malone's creativity is on proud display in the AT&T deal. AT&T will pay \$36 billion for TCI and assume \$11 billion in debt. For Liberty, AT&T will do a stock swap with a new class of shares, allowing Liberty to remain a "tracking stock," meaning that the company does not directly own its assets. Instead, the assets will be owned by AT&T, and Liberty's stock will "track" the performance of those designated assets.

As previously reported, Mr. Malone structured the TCI sale so that class B shares will get a premium of 9.7 percent more AT&T stock than class A shares. Mr. Malone owns about 30 million class B shares.

Currently, about half his fortune is in TCI and half in Liberty, but after the deal Mr. Malone will effectively control Liberty and will be able to sell the company, if he wants, with little prior approval from AT&T.

Liberty has told stock analysts that as part of the deal it will get the right to a \$1.8 billion net operating loss that has been spread across the Tele-Communications businesses. By carrying forward that loss in future years, Liberty could realize a gain of up to \$1.8 billion, say from the sale of assets, without owing any taxes. A valuable right indeed.

That's not all. Under the agreement, Liberty can borrow up to 25 percent of its market capitalization without requesting AT&T's permission. The arrangement permits Liberty to borrow even more as long as it does not affect AT&T's double-A credit rating. In all likelihood, the credit rating agencies will assign ratings based on AT&T's balance sheet, instead of Liberty's, meaning lower borrowing rates as well.

AT&T declined to comment on the tax loss or the borrowing authority.

As the deal is structured, Liberty Media will be merged with another unit, also a tracking stock, TCI Ventures, and the combined company's operations will remain essentially independent of AT&T. But when it comes to tax breaks and borrowing power, Liberty will be part of the AT&T family, getting all the benefits of that blue-chip name.

John Tinker, a stock analyst at Nationsbank Montgomery Securities, is bullish on Liberty's future. "They have cash, access to lots more and they are still part of the family," he said.

Liberty Media, which now has stakes in Time Warner, USA Networks, Discovery Networks and nearly two dozen cable programming services, will get several Internet and other new media services of TCI Ventures, which holds stakes in At Home, United Video Satellite Group and Sprint Spectrum. The combined company's market capitalization will be about \$27 billion.

The New York Times, July 27, 1998

That means Mr. Malone can borrow at least \$6.75 billion at will. He also expects to recognize \$5.5 billion soon from planned asset sales. So in all, Mr. Malone will have ready access to about \$12.25 billion, which he says he will use to buy stakes in more programming ventures. This pot of cash and its ultimate use are critical to the company's valuation.

From an investor's point of view, Liberty will look much like a specialized media mutual fund, except with stakes in private companies as well as public ones.

"It is still very complicated," Mr. Tinker said, pointing out that Liberty is a portfolio of investments -- in companies run by other people -- not an operating company. Mr. Bennett, the president, added that Liberty invests in concerns with strategic benefits and usually puts one of its own executives on the boards of those companies it invests in.

Liberty's unusual corporate structure and the perks make it a challenge to gauge just how much the company is worth. Its stock is hovering near \$40 for each A share, slightly off its all-time high of \$44 hit shortly after the AT&T deal was announced. "But it's trading at about 11 times 1998 cash flow," Mr. Tinker said. "That's low relative to other media companies in part because it is so complex and the Street has not reflected the TCI Ventures merger." Even calculating the multiple is hard because many investments, such as Time Warner, are publicly traded and fluctuate in value.

Its holdings will change fairly quickly, too. TCI Ventures now owns a stake in Teleport, which some time ago struck a deal to merge with AT&T. TCI Ventures was to have gotten \$3 billion in AT&T stock, but AT&T has agreed to buy back those shares for cash. AT&T will also pay TCI Ventures \$2.5 billion in cash for its stakes in National Digital Television, Western Telecommunications and At Home. And those sales won't create any capital gains. Tracking stocks can sell an asset to another part of the tracking stock family -- in this case AT&T -- without causing any tax gain.

After those sales, TCI Ventures will still have a sizable stake in Sprint Spectrum, which is expected to be spun off as a tracking stock. Liberty's stake would be worth an estimated \$2 billion in a spinoff. If Liberty sold that stake, on which its investment is negligible, it could shelter almost all the gain with the \$1.8 billion net operating loss it has described to Wall Street.

Keeping a close tab on exactly what Liberty is and what it has been is no easy matter. In 1991, when Mr. Malone spun off Liberty from TCI, the company distributed an inch-thick prospectus describing Liberty's 34 investments. Investors could get one Liberty "right" for every 200 shares of TCI. Each "right" let an investor exchange 16 TCI shares for a Liberty share, valued at \$256.

While many shareholders were bewildered by the offering's complexity and decided to sit on the sidelines, Mr. Malone got 8.7 percent of Liberty's shares, three times more than he would have got had everyone participated. In later years, the company was reacquired by TCI and then spun off again.

Though many companies are trying to simplify complex financial data, Mr. Malone feels no such pressure. For investors, that means that keeping track of Mr. Malone is a full-time job.

The New York Times, July 27, 1998

GRAPHIC: Photo: John C. Malone has strengthened his position in Liberty Media after the sale of its parent, Tele-Communications, to AT&T for \$36 billion. (Associated Press)

Table: "How to Turn \$42 Million Into \$1.76 Billion"

John Malone's initial stake in Liberty Media, which was spun off from Tele-Communications Inc. in 1991, is worth 40 times as much today. (He has sold some shares and acquired others in separate transactions, making his current holdings somewhat different from what they were in 1991.): Chart shows John Malone's investment results for five transactions taking place between 1991 and 1996, along with the current values of the stocks. (Source: Liberty Media) (pg. D6)

LANGUAGE: ENGLISH

LOAD-DATE: **July 27**, 1998

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of)	
AT&T Corporation,)	
Transferee,)	
and)	CC Docket No. 98-178
Tele-Communications, Inc. (TCI),)	
Transferor,)	
)	
For FCC Consent to Transfer of)	
Control Pursuant to Section 310(d))	
of the Communications Act, as amended,)	
of Licenses and Authorizations Controlled)	
by TCI or its Affiliates or Subsidiaries)	

COMMENTS OF AMERITECH

Kelly R. Welsh
John T. Lenahan
Counsel for Ameritech
30 S. Wacker Drive
39th Floor
Chicago, Illinois 60606
(312) 750-5367

Christopher M. Heimann
Counsel for Ameritech
1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
(202) 326-3818

CERTIFICATE OF SERVICE

This is to certify that the attached document has been served by first class mail,
postage prepaid, on this 29th day of October, 1998, on the following:

Mark C. Rosenblum, Esq.
Vice President, Law and Public Policy
AT&T Corporation
295 North Maple Avenue
295 Basking Ridge, NJ 07920

Robert L. James, Esq.
Cole, Raywid & Braverman, L.L.P.
Suite 200
1919 Pennsylvania Avenue, NW
Washington, DC 20006

Mark D. Schneider, Esq.
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Stephen J. Flessner
Director of FCC Compliance
Tele-Communications, Inc.
P.O. Box 5630
Denver, CO 80217

Sherille Ismail*
Telecommunications International Bureau
Federal Communications Commission
2000 M Street, NW
Room 800
Washington, DC 20554

Karl Kensinger*
Satellite & Radio Communications Division
International Bureau
Federal Communications Commission
2000 M Street, NW
Room 800
Washington, DC 20554

Quyen Truong*
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

Evette Keene*
Video Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Deborah Lathen*
Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
Room 918
Washington, DC 20554

* By Hand Delivery

Royce Dickens*
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
Room 406
Washington, DC 20554

Walter Strack*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW
Room 5002
Washington, DC 20554

International Transcription Service*
1919 M Street, NW
Room 246
Washington, DC 20554


Carly B. Tolchin